

BORA LASKIN LAW LIBRARY



3 1761 10082818 5



UNIVERSITY OF TORONTO
FACULTY OF LAW

FREEDOM OF EXPRESSION AND THE PRESS

VOLUME 1

M. David Lepofsky

Fall 2018

**KE
4418
.L46
2018
v.1
c.1**

DORA LASKIN LAW LIBRARY

SEP - 7 2018

FACULTY OF LAW
UNIVERSITY OF TORONTO



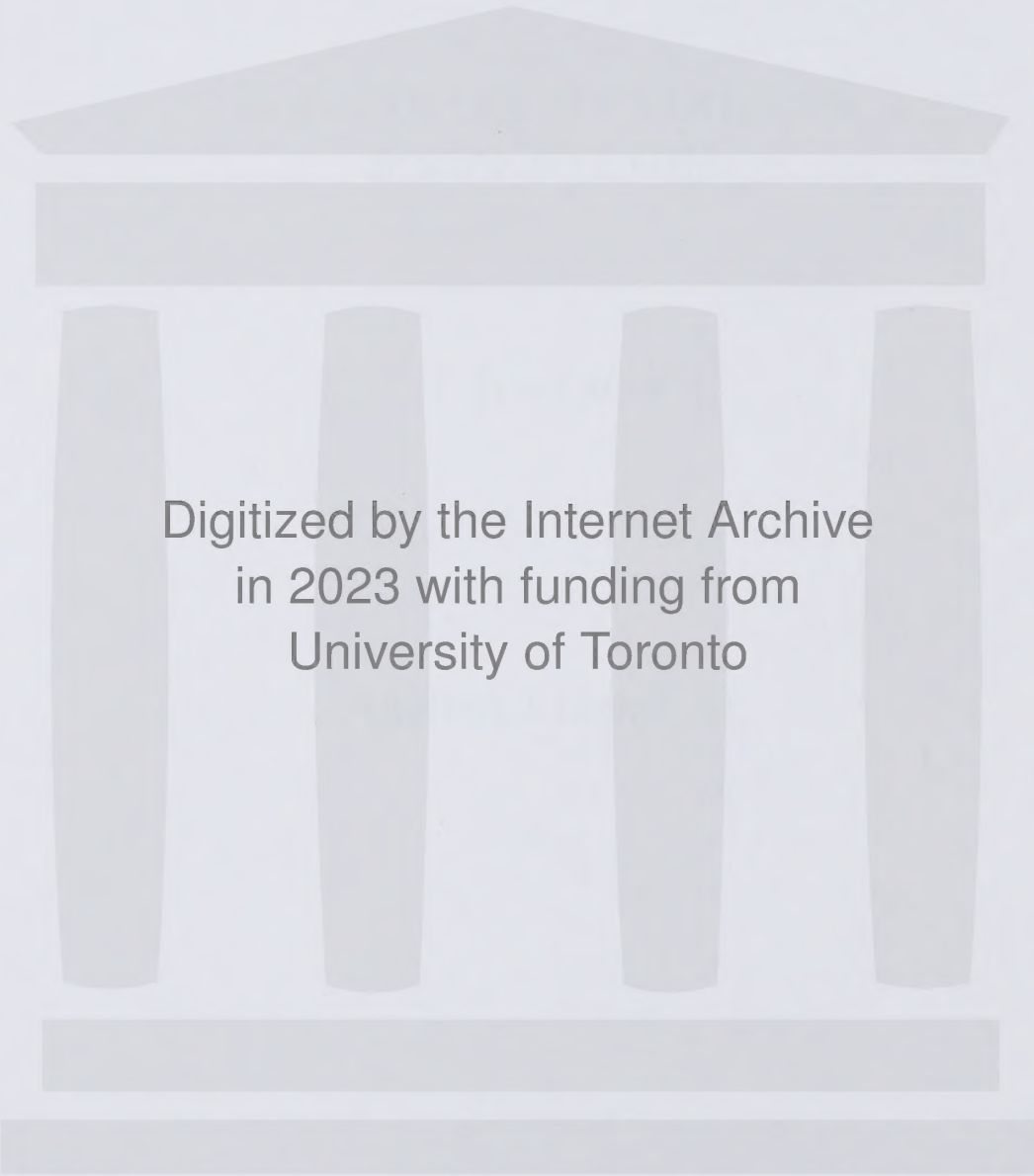
UNIVERSITY OF TORONTO
FACULTY OF LAW

**FREEDOM OF EXPRESSION
AND THE PRESS**

VOLUME 1

M. David Lepofsky

Fall 2018



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

1. INTRODUCTION

From: M. David Lepofsky, "Towards A Purposive Approach to Freedom of Expression and Its Limitation," The Cambridge Lectures 1989, Les Editions Yvon Blais Inc., Cowanville, (Quebec).

The topic of freedom of expression is as old as organized society itself. Yet, it retains a prominent air of ongoing vibrancy and controversy. Free speech issues have become increasingly pressing in Canada for two reasons.

First, the Canadian Charter of Rights and Freedoms was proclaimed in force in 1982. Charter s. 2(b) enshrined for the first time into Canada's written constitution an explicit guarantee of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." This provision makes free speech part of the supreme law of Canada¹ so that any law or other government action which unreasonably inhibits these fundamental freedoms is now of no force or effect.²

Second, there is among some in Canada a striking ambivalence towards the concept of a fundamental right of free speech. This is exemplified by a comparison of two virtually contemporaneous events in recent history. Salman Rushdie, the author of the novel "Satanic Verses," was the target of a death threat, at the instance of Iran, on account of the views he expressed in writing. In Canada, as elsewhere, outrage was voiced at the suggestion that a government could so terrorize a person because of the ideas which he or she commits to writing in good faith. At approximately the same time, University of Western Ontario Professor Phillippe Rushton was the subject of widespread and official condemnation for authoring studies which purported to scientifically rank certain races, including blacks whites and orientals, in order of their intelligence. Denunciation included calls that Rushton's tenure and his research grants be officially terminated. At the same time as Rushdie's right to express himself was advocated, Rushton's was condemned.

The Rushdie/Rushton dilemma brings into sharp focus the question: to what extent can freedom of expression be justifiably limited in a free and democratic society? To answer this question, it is essential to evolve manageable and coherent principles which do not simply draw the line between permissible and prohibited speech at the point which divides speech which we like from speech which we do not. Line-drawing in the area of human expression is inherently risky, because it potentially enables courts to become society's political, social and artistic censor boards. Accordingly, any judicial power to delineate the scope of, and permissible limits on freedom of expression must be exercised sparingly, cautiously and with intense sensitivity for its inherent dangers.

It is axiomatic that freedom of expression is critically important in a democratic society. It is by no accident that this freedom is set out in the *Charter* in section 2, the first *Charter* provision which enumerates constitutional rights, any more than it is pure coincidence that

¹ see *Constitution Act 1982*, s. 52(1).

² *Ibid.*

freedom of speech and press are guaranteed in the First Amendment to the U.S. Constitution, the first provision of the American Bill of Rights. Yet, grand proclamations of free expression's importance alone provide no assurance that this liberty will be adequately safeguarded.

There is no better indication of the risk that freedom of expression can be limited too hastily, at the expense of both society and the individual, than by reference to the maxim which is not frequently proffered to justify a restriction on that right. When specific speech restrictions are challenged, it is often said in their defence that free speech is not an absolute right, since you cannot cry fire in a crowded theatre. This defence suffers from two critical flaws.

First, as it is commonly rendered, this is a misquotation. In the famous case of *Schenck v. U.S.*³, U.S. Supreme Court Justice Oliver Wendell Holmes did not prohibit the crying of "Fire" in a crowded theatre. Rather he stated that: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁴ There is a critical difference between this actual quotation on the one hand and the inaccurate form in which it is usually rendered, on the other. There is nothing wrong with crying "fire" in a crowded theatre, if there is indeed a fire there. To the contrary there is compelling reason to laud one who truthfully cries fire in such a situation. The misquotation of Holmes demonstrates the danger of leaping too quickly to the defence of a speech restriction, by sweeping within a limitation's justification both speech which endangers lives (which we should prohibit) and speech which saves lives (which we must foster).

Second, it does not follow from the fact that freedom of expression is not an absolute right that *any* limitation on this liberty is *ipso facto* justified. Each limit on expressive freedom must be tested individually, while retaining a healthy scepticism about the restriction's necessity, and a cautious fear about the high stakes that are wagered when free speech is put on the table.

This book has been prepared as an aid for courses on freedom of expression. It is intended to provide the reader with an overview of many of the key free expression and press issues which have arisen, and are likely to arise, in Canada since the enactment of the *Canadian Charter of Rights and Freedoms*. These issues will be of compelling importance to courts which are called upon to interpret the *Charter*, to legislators who are obliged to take the *Charter* into account when voting on new bills, to government officials whose conduct can be questioned under the *Charter*, to the organized mass media which are daily involved in the information-gathering and dissemination business, and to members of the public, whose rights and interests are ultimately at stake in any free expression claims, and in any *Charter* s. 1 "reasonable limits" defence.

The first chapters of these materials are intended to address the key background and foundations which are needed to tackle specific free speech questions. The first chapter provides an overview of the general principles of *Charter* interpretation which have been laid down by the courts, and which govern *Charter* s. 2 (b) claims, as well as all other claims under the *Charter*. The second chapter surveys the purposes which freedom of expression can serve -- purposes

³ 249 U.S. 47 (1919).

⁴ *Ibid.*, p. 52 (emphasis added).

which repeatedly come into play in free speech analysis. The third chapter reviews some of the key features of pre-*Charter* Canadian law pertaining to freedom of expression. This provides a historical background to the *Charter*, and a doctrinal context within which Canadian judges began their exploration of *Charter* principles.

The fourth chapter outlines leading cases and doctrines which have emerged under the U.S. Constitution's free speech and press clauses of the First Amendment. Throughout these materials, First Amendment jurisprudence is set out for several purposes. It provides a potential source for ideas and doctrines in evolving Canada's approach to a constitutional guarantee of freedom of expression. Second, it can provide examples of doctrinal pitfalls which Canada may wish to avoid. Third, it often provides illustrations of challenging fact situations, from which doctrinal debates can readily emerge. Finally, American constitutional jurisprudence has already influenced *Charter* interpretation to a substantial degree. Terms like "overbroad," "clear and present danger," and "least restrictive alternative" have all found their way into *Charter* jurisprudence in general, and section 2(b) case law in particular. It is helpful to know the source of these concepts, to examine their comparative meanings in the Canadian and American contexts, and to question to what extent their importation into Canada is a good or bad thing.

On the basis of these introductory materials, attention turns in the fifth chapter to the specific content of *Charter* s. 2(b). That chapter reviews the Supreme Court of Canada's major pronouncements to date on the meaning of freedom of expression, and explores the question whether and when free expression challenges should proceed to the justification stage of analysis under s. 1. The balance of the chapters proceed to each consider specific expression issues and topics, ranging from pornography and hate propaganda to claims of constitutional rights of the public to attend court proceedings, or of civil servants to be able to speak out on current political topics. Some of these subjects have already secured extensive judicial attention in Canada, while others, while ripe for litigation, have yet to be the subject of extensive authoritative pronouncements by Canada's courts.

2. THIS CASEBOOK

The revised edition of this casebook is largely based on the original work which was jointly prepared by myself, Professor Jamie Cameron of Osgoode Hall Law School, and Chris Bredt. While significant portions of the original contributions of Professor Cameron and Mr. Bredt are present in these materials, full responsibility (or blame) for revisions and additions is mine.

3. ACKNOWLEDGEMENTS

I wish to acknowledge my indebtedness and profound thanks for the assistance of my research assistant on this Seventh edition of this casebook, Mr. Daniel Carens-Nedelsky. He, along with those who assisted with previous editions, Jacob Weinrib, Ian Peach, Eddie Taylor and Nancy Park Taylor (no relation) were extremely helpful in bringing this project to completion. Any errors in judgment in the presentation of these materials are solely mine, not theirs. As of this edition, this casebook is now up to date as of mid 2015.

Note: M. David Lepofsky is counsel with the Criminal Law Division, Ontario Ministry of the Attorney General. The material in this casebook has been written in his personal capacity and does not purport to represent the views of the Attorney General or the Ministry.

CHAPTER 2

BASIC PRINCIPLES OF CHARTER INTERPRETATION

1. INTRODUCTION.....	6
2. BASIC APPROACH TO CHARTER INTERPRETATION - THE ROLE OF THE COURTS	9
<i>Law Society of Upper Canada v. Skapinker</i> , [1984] 1 S.C.R. 357	9
<i>Reference re. Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288</i>	10
(<i>B.C. Motor Vehicle Reference</i>), [1985] 2 S.C.R. 486	10
3. PURPOSIVE APPROACH TO THE CHARTER	12
<i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	12
4. UNCONSTITUTIONAL PURPOSE AND EFFECTS OF A LAW	14
a) Purpose and effect in the adjudication of substantive rights-bearing provisions:	14
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	14
<i>R. v. Jones</i> , [1986] 2 S.C.R. 284	16
b) Purpose and effect in adjudication under s. 1 of the Charter:	17
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	17
5. TEST FOR APPLYING SECTION 1.....	18
(a) Reasonable and Demonstrably Justified Limits	18
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	18
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103.....	19
<i>R. v. Edwards Books and Art Ltd.</i> , [1986] 2 S.C.R. 713	22
(b) Elaborations on the Standard	23
<i>Irwin Toy Limited v. Quebec (Attorney General)</i> [1989] 1 SCR 927	23
<i>R. v. Chaulk</i> [1990] 3 S.C.R. 1303	25
<i>McKinney v University of Guelph</i> [1990] 3 S.C.R. 229	28
<i>Alberta v. Hutterian Brethren of Wilson Colony</i> [2009] S.C.J. No. 37	33
Notes and Questions.....	41
(c) Prescribed By Law	42
<i>Re Ontario Film and Video Appreciation Society and Ontario Board of Censors</i> (1983) 41 O.R.	
(2d) 583	42
<i>Slaight Communications Inc. v. Davidson</i> [1989] 1 S.C.R. 1038.....	43
<i>R. v. Nova Scotia Pharmaceutical Society</i> [1992] 2 S.C.R. 606.....	44
6. CONTEXTUAL AND NON-CONTEXTUAL APPROACHES TO CHARTER	
ADJUDICATION	47
<i>Edmonton Journal v. Alberta (Attorney General)</i> , [1989] 2 S.C.R. 1326	47
7. STANDING TO SEEK CHARTER RELIEF	49
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	49
<i>Irwin Toy Ltd. v. Quebec (A.-G.)</i> , [1989] 1 S.C.R. 927	51
8. APPLICATION OF CHARTER -- GOVERNMENT ACTION VERSUS PRIVATE ACTION	
53	
<i>R.W.D.S.U v. Dolphin Delivery</i> , [1986] 2 S.C.R. 573.....	54
<i>McKinney v. University of Guelph</i> [1990] 3 S.C.R. 229.....	55
<i>Hunter v. Southam</i> [1984] 2 S.C.R. 145	58
<i>R. v. Gayme; R. v. Seaboyer</i> (1991) 83 D.L.R. (4th) 193 SCC	59
<i>Schacter v. Canada (A.G.)</i> , (1992) 93 D.L.R. (4th) 1.....	62
9. THE PRINCIPLE OF PRECEDENT IN CHARTER CASES	65

<i>Canada (Attorney General) v. Bedford</i> [2013] S.C.J. No. 72	65
Notes and Questions.....	71

1. INTRODUCTION

This chapter provides an overview of the basic principles of **Charter** interpretation which have been enunciated by the Supreme Court of Canada. It provides a backdrop for the balance of the book, which reviews the application of these principles to issues pertaining to freedom of expression. While many of these principles may seem familiar from a course on introductory constitutional law, they are in fact more complex than they first seem. For example, the test for justifying a **Charter** infringement under s. 1 is continually evolving. Although the original formulation of the s. 1 test in the Oakes case is still repeatedly cited in judgements, subsequent judicial pronouncements on its application make the original Oakes formulation less clear than it originally seemed to be.

CHAPTER 3

PRE-CHARTER CONSTITUTIONAL PROTECTION FOR FREEDOM OF EXPRESSION

1. INTRODUCTION.....	73
2. IMPLIED BILL OF RIGHTS JURISPRUDENCE	74
<i>Reference re Alberta Statutes</i> , [1938] S.C.R. 100	74
<i>Boucher v. The King</i> , [1951] S.C.R. 265.....	75
<i>Saumur v. Quebec</i> , [1953] 2 S.C.R. 299	76
<i>Switzman v. Elbling</i> , [1957] S.C.R. 285	77
<i>McKay v. the Queen</i> , [1965] S.C.R. 798.....	78
<i>Nova Scotia Board of Censors v. McNeil</i> , [1978] 2 S.C.R. 662.....	79
<i>A.-G. Canada and Dupond v. Montreal</i> , [1978] 2 S.C.R. 770	80
<i>A.-G. Canada v. Law Society of B.C.; Jabour v. Law Society of B.C.</i> [1982] 2 S.C.R. 307	82
Notes and Questions.....	82
3. THE CANADIAN BILL OF RIGHTS.....	83
Notes and Questions.....	84

1. INTRODUCTION

The question presented in this chapter is: to what extent did Canadians enjoy constitutional protection for freedom of expression prior to the enactment of the **Charter**? This question is of importance for more than simply historical reasons. To understand what **Charter** s. 2(b) means, it is necessary to examine what protection existed for speech and press freedom prior to its enactment. It is also important to consider what Canadian courts had to say about the idea of free speech, and to examine what importance they attached to this value before the **Charter**, as a backdrop to any evaluation of their treatment of this right under the **Charter**.

The view has been expressed on several occasions that Canadian courts have always treasured free speech, and acted as vigorously as their jurisdiction allowed before the **Charter** to protect expressive freedom. For example, Professor Peter Hogg has written in his book, Constitutional Law of Canada (2nd ed., 1985), at p. 713:

Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the **Charter of Rights**.

As well, in its **Charter** ruling in R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573, McIntyre J. stated: "Prior to the adoption of the **Charter**, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status." This view has been repeated on a number of occasions in subsequent Supreme Court decisions, as will be seen throughout the materials in this book. To what extent are these descriptions accurate? What implications flow from this view for **Charter** analysis?

CHAPTER 4

PURPOSES AND FUNCTIONS OF FREEDOM OF EXPRESSION

1. INTRODUCTION.....	87
2. LEARNED COMMENTARIES ON THE PURPOSES FOR FREEDOM OF EXPRESSION	88
John Stuart Mill; <i>On Liberty</i> ; (Middlesex: Penguin Books, 1985).....	88
Alexander Meiklejohn; <i>Free Speech and Its Relation to Self-Government</i> ; (New York: Kennikat Press, 1972)	90
Thomas I. Emerson, "Toward a General Theory of the First Amendment", 72 <i>Yale L.J.</i> 877 (1963)	94
Vincent Blasi; "The Checking Value in First Amendment Theory" (1977) <i>American Bar Foundation Research Journal</i> 521.....	102
Notes and Questions.....	104
3. THE HOLMES CORRESPONDENCE	104
Letter: <i>Learned Hand to Oliver Wendell Holmes</i> , June 22, 1918.....	107
Letter: <i>Oliver Wendell Holmes to Learned Hand</i> , June 24, 1918.....	108
Letter: <i>Oliver Wendell Holmes to Harold Laski</i> , July 7, 1918.....	109
Notes and Questions.....	109
4. JUDICIAL COMMENTARIES ON THE PURPOSES FOR FREEDOM OF EXPRESSION	111
a) The Charter's Purposes Generally:.....	111
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103.....	111
b) The Purposes of Freedom of Expression:	112
<i>Abrams v. United States</i> , 250 U.S. 616 (1919)	112
Notes and Questions.....	114
<i>Reference re. Alberta Statutes [the Alberta Press case]</i> , [1938] S.C.R. 100.....	115
Notes and Questions.....	116
<i>R.W.D.S.U. v. Dolphin Delivery Ltd.</i> , [1986] 2 S.C.R. 573.....	118
<i>Ford v. Quebec (A.-G.)</i> , [1988] 2 S.C.R. 712.....	121
Notes and Questions.....	122
<i>R. v. Keegstra</i> , [1996] 1 S.C.R. 458.....	123
<i>Canada (A.-G.) v. Committee for the Commonwealth of Canada</i> [1991] 1 S.C.R. 139	126

1. INTRODUCTION

The question presented in this chapter is as follows: what purposes or functions are served by freedom of expression, including freedom of the press and other media of communication, as guaranteed by s. 2(b) of the Charter? This is the most fundamental, and perhaps the most vexing of the questions presented in these materials. Its resolution is central to the formulation of a coherent and principled approach to s. 2(b).

As a matter of abstract principle, we tend to assume that expressive activity is intrinsically valuable. From that perspective, it may not seem problematic to give expressive activity a special immunity from regulation. However, even in advance of any effort at tackling specific free speech topics, the very task of identifying the purposes for this freedom plunge us into fundamental questions, the answers to which are neither easy nor uncontroversial. Most of us would concede that expressed views can be offensive, odious or harmful. When confronted with that reality, we are forced to reconsider the assumption that expressive activity is per se valuable. Expressive freedom may be valuable in the abstract; does it necessarily follow, however, that it should automatically be protected by the Charter?

The Supreme Court of Canada has required a rigorous inquiry into the purposes served by freedom of expression. The court held in Hunter v. Southam, [1984] 2 S.C.R. 145 that the **Charter** is itself a purposive document, and that its rights are to be given a purposive interpretation.

A purposive approach to a **Charter** right has twin components. First, the right must be interpreted in a sufficiently liberal fashion that it achieves its purposes. Second, the right should not be so inflated as to overshoot its purposes (R. v. Big M Drug Mart Ltd., at 344).

CHAPTER 5

THE FREE SPEECH AND PRESS CLAUSES OF THE U.S. CONSTITUTION

1. INTRODUCTION.....	132
2. INTRODUCTION TO THE U.S. CONSTITUTION	133
Law Society of Upper Canada; <i>Public Law Teaching Materials -- Bar Admission Course, 1988-89</i> , Chapter 19: "Litigating Charter Claims: Legal, Factual and Evidentiary Ammunition"	133
3. USING AMERICAN CONSTITUTIONAL JURISPRUDENCE IN CHARTER CASES	134
M. David Lepofsky; <i>Open Justice: The Constitutional Right to Attend and Speak About Court Proceedings</i> ; (Toronto: Butterworth's, 1985), Chapter 5: The Canadian Legal Position Under the Charter of Rights	136
4. THE EARLY YEARS -- EVOLVING THE CLEAR AND PRESENT DANGER TEST	139
<i>Schenck v. United States</i> , 249 U.S. 47 (1919)	139
<i>Abrams v. United States</i> , 250 U.S. 616 (1919)	140
<i>Whitney v. California</i> , 47 S.Ct. 641 (1927)	143
<i>Dennis v. United States</i> , 341 U.S. 494 (1951)	146
<i>Brandenburg v. Ohio</i> 395 U.S. 444 (1968).....	156
5. CONTENT-NEUTRAL TIME, PLACE, AND MANNER RESTRICTIONS ON EXPRESSION	161
<i>Police Department of Chicago v. Mosley</i> , 408 U.S. 92 (1972).....	161
6. PURPOSIVE AND EFFECTS-BASED LIMITS ON FREE SPEECH.....	163
<i>Schneider v. State of New Jersey</i> , 60 S.Ct. 146 (1940)	163
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	165
7. THE SPECIAL POSITION OF PRIOR RESTRAINTS ON EXPRESSION.....	167
<i>Near v. State of Minnesota</i> , 51 S.Ct. 625 (1931).....	167
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	170
Notes and Questions.....	175

1. INTRODUCTION

The purpose of this chapter is to provide an introduction to the jurisprudence under the First Amendment to the U.S. Constitution as it relates to the free speech and press clauses.

The First Amendment provides as follows:

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Throughout these materials, First Amendment jurisprudence pertaining to specific free expression topics is set out. This introductory overview will assist in the reading of the chapters that follow, by introducing the basic doctrines which have evolved under the First Amendment, and the juristic vocabulary that is frequently employed.

CHAPTER 6

THE SCOPE OF FREEDOM OF EXPRESSION UNDER THE CHARTER

1. INTRODUCTION.....	178
2. GENERAL PRINCIPLES OF FREEDOM OF EXPRESSION UNDER THE CHARTER... 179	
(a) The Supreme Court's First Endeavour	179
<i>R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.</i> , [1986] 2 S.C.R. 573	179
Notes and Questions.....	182
(b) The Supreme Court's Second Major Endeavour	184
<i>Ford v. Quebec (A.-G.)</i> , [1988] 2 S.C.R. 712	184
(c) The Supreme Court's Most Comprehensive Endeavour.....	185
<i>Irwin Toy Ltd. v. Quebec (A.-G.)</i> , [1989] 1 S.C.R. 927	185
Notes And Questions.....	195
<i>Reference Re Section 193 and 195.1 (1) (c) of the Criminal Code (Manitoba) (the Prostitution Reference)</i> [1990] 1 S.C.R. 1123.....	200
3. COMPELLED SPEECH -- A PRELIMINARY INQUIRY	202
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 S.C.R. 1038	202
Notes and Questions.....	204
<i>Lavigne v. Ontario Public Service Employee Union et al.</i> [1991] 2 S.C.R. 211	205
Notes and Questions.....	211
4. THE AMERICAN APPROACH TO THE PRIMA FACIE SCOPE OF FREEDOM OF EXPRESSION	213
(A) The Categorical Exclusion of Certain Messages from the First Amendment	213
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	213
Notes and Questions.....	215
(B) The American Distinction Between Speech and Conduct.....	216
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	216
Notes and Questions.....	217
<i>Texas v. Johnson</i> , 109 S.Ct. 2533 (1989)	220
Notes and Questions.....	221
(C) The Severity of the Burden on Expression	223
<i>Rust, et al., v. Sullivan, Secretary of Health and Human Services; New York, et al.</i> , Supreme Court of the United States 111 S. Ct. 1759; 1991	223
Notes and Questions.....	230
5. FREEDOM OF EXPRESSION AND THE DEMOCRATIC/ELECTORAL PROCESS	231
<i>Haig v. Canada; Canada (Chief Electoral Officer)</i> [1993] 2 S.C.R. 995	231
Notes and Questions.....	239
<i>Siemens v. Manitoba (Attorney General)</i> , [2003] 1 S.C.R. 6, 2003 SCC 3.....	241
Notes and Questions.....	242
<i>Native Women's Assn. of Canada v. Canada</i> [1994] 3 S.C.R. 627	243
Notes and Questions.....	253
6. WHAT'S IN A NAME?	254
<i>Walker v. Prince Edward Island</i> [1995] 2 S.C.R. 407	254
Notes and Questions.....	254

1. INTRODUCTION

This chapter considers how the words of s.2(b), guaranteeing "freedom of expression", should be interpreted as a general matter. It provides the underpinning for the discussion that follows throughout these materials. It focuses on key themes which are recurrent in free speech jurisprudence. This chapter takes a first look at those basic issues which are revisited throughout the rest of these materials.

Four fundamental questions are inherent in any inquiry into the **Charter's** constitutional free expression guarantee:

1. What is "expression", and should we invoke a distinction between speech on the one hand, and conduct or action on the other hand, to exclude certain types of activity from s.2(b)?
2. Once a court is satisfied that a communication or activity falls within the definition of "expression", should it draw a further distinction between protected and unprotected expression, in order to exclude activities not considered worthy of the Charter's protection?
3. What is meant by the term "freedom" in s. 2(b)? Does any interference with "expression" ipso facto constitute an infringement or denial of the "freedom" of expression? For example, does freedom in relation to expression include the freedom from state compulsion to say something that you do not wish to say?
4. In the general scheme of the Charter, when is it necessary to resort to s. 1, and when are free expression disputes to be resolved within the four corners of s. 2(b)?

We will begin with the basic principles set out in R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Ford v. A.G. Quebec [1988] 2 S.C.R. 712; and Irwin Toy Ltd. v. A.-G. Quebec, [1989] 1 S.C.R. 927. We will also take a preliminary look at the early Supreme Court of Canada pronouncements on compelled expression. We will then look to some important U.S. First Amendment cases dealing with comparable issues.

CHAPTER 7

SUBVERSIVE AND UNPATRIOTIC EXPRESSION

1. INTRODUCTION.....	257
2. NOTE: FREEDOM OF EXPRESSION AND THE OFFICIAL REGULATION OF THE CONTENT OF EXPRESSION	258
3. CANADIAN LAW ON SUBVERSIVE AND UNPATRIOTIC SPEECH	262
Criminal Code, R.S.C. 1985, c. C-46.....	262
Notes and Questions.....	263
4. THE FIRST AMENDMENT AND SUBVERSIVE AND UNPATRIOTIC SPEECH	265
<i>Cohen v. California</i> , 403 U.S. 215 (1971).....	265
Notes and Questions.....	268
<i>Texas v. Johnson</i> , 109 S.Ct. 2533 (1989)	270
Notes and Questions.....	284

1. INTRODUCTION

This chapter commences the inquiry into the status of expressive activity that may offend. As experience has shown, legislative majorities have at times been unable to resist the temptation to prohibit activity that is perceived to be politically, socially or morally offensive. Much of the First Amendment jurisprudence finds its roots in the sedition and espionage cases of the First World War era, and the debate about the permissibility of suppressing communist activities during the Cold War.

Offensive unpatriotic speech may offend its citizens, but is aimed primarily at the state. The suppression of opinions that criticize the government seems particularly inappropriate in a democracy. To Canadians, therefore, the American cases discussing the censorship of unpatriotic expression - as in the Vietnam protest and flag desecration cases - may seem distinctively American.

A subsequent chapter considers the validity of legal restrictions on defamation law. In considering subversive and unpatriotic expression here, it may seem equally clear to some that defamatory statements should not receive any constitutional protection, because in the case of defamation, the offensive expressive activity in question is directed at an individual or individuals, or at members of an identifiable group.

As a matter of principle, however, it may be less clear why individuals should be free to express unorthodox, disloyal or offensive opinions about the state, but not about each other. Whenever the state acts to protect the listener, through Criminal Code provisions or the common law of defamation, it necessarily suppresses the views of the speaker. Whether the censorship of offensive expression is consistent with a guarantee of expressive freedom is the subject of these materials.

These materials lead naturally into subsequent chapters which consider the status of racist speech, and obscenity, pornography and sexist speech, respectively. In discussing whether the state can prohibit opinions, beliefs or ideas it disapproves of, our focus will be on the viability of "content neutrality" as a general principle of adjudication.

CHAPTER 8

FREEDOM OF EXPRESSION AND NATIONAL SECURITY

1. INTRODUCTION.....	287
2. BACKGROUND TO THE CANADIAN APPROACH.....	288
<i>Freedom and Security under the Law</i> , the Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (August, 1981); Summary of Recommendations	288
<i>Canadian Security Intelligence Service Act</i> , R.S.C. 1985, c. C-23	288
3. DOES FREEDOM OF EXPRESSION PROTECT VIOLENT EXPRESSION?	289
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] S.C.J. No. 3	289
<i>R. v. Khawaja</i> [2012] S.C.J. No. 69 (Supreme Court of Canada).....	292
Notes and Questions.....	298
4. PROHIBITING PUBLICATION OF MATERIALS THREATENING TO NATIONAL SECURITY	299
<i>New York Times v. United States</i> , 91 S.Ct. 2140 (1971)	299
<i>U.S. v. Progressive Inc.</i> , 467 F.Supp 990 (W.D. Wis. 1979).....	303
5. DO SPIES HAVE FREEDOM OF EXPRESSION?.....	304
<i>Snepp v. U.S.</i> , 100 S.Ct. 763 (1980).....	304

1. INTRODUCTION

This chapter inquires into the extent to which freedom of expression can justifiably be limited in order to protect national security. In examining the following materials, consider the two conflicting claims which inevitably arise in national security/free speech cases. On the one hand, it is argued that the protection of national security is so fundamental to society, and the enemies to a nation's security (such as terrorists) employ such insidious methods to secure their aims, that government must be given wide latitude to promote national security; the courts should afford the government great deference in these circumstances. On the other hand, it is argued in opposition to the foregoing view that in times of severe threat to national security, freedom of expression and other basic rights are in such profound jeopardy that their protection requires increased vigilance.

Core issues that arise in this context include those of what exactly is meant by national security? Can it be defined? And who should have the final say on national security issues, the courts or the government?

